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9

10 IN THE UNITED STATES DISTRICT COURT

11 FOR THE DISTRICT OF NEVADA

12 UNITED STATES OF AMERICA,

13 Plaintiff,

14 WALKER RIVER PAIUTE TRIBE,

15 Plaintiff-Intervenor,

16 v.

17 WALKER RIVER IRRIGATION DISTRICT,
18 a corporation, et al.,

19 Defendants.
20

21 UNITED STATES OF AMERICA, WALKER
22 RIVER PAIUTE TRIBE,

23 Counterclaimants,
24

25 v.

26 WALKER RIVER IRRIGATION DISTRICT,
et al.,

27 Counterdefendants.
28

FILED

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LANCE S. WILSON
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) In Equity No. C-125-ECR

) Subfile No. C-125-B

) **STATEMENT OF THE WALKER
RIVER IRRIGATION DISTRICT**

) **REGARDING METHODS USED BY**

) **THE UNITED STATES OF AMERICA**

) **AND WALKER RIVER PAIUTE TRIBE**

) **TO IDENTIFY PERSONS AND**

) **ENTITIES TO BE SERVED PURSUANT**

) **TO PARAGRAPH 3 OF THE CASE**

) **MANAGEMENT ORDER**

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1 **I. INTRODUCTION.**

2 At the status conference of May 30, 2001 the Court ordered the United States and the
3 Walker River Paiute Tribe (the "Tribe") to describe the methods they have used to identify
4 persons required to be joined and served under the Case Management Order. The other parties
5 were given an opportunity to object or suggest additional methods. *May 30, 2001 Minute*
6 *Order, (Doc. No. 521).*

7 Before providing the suggestions of the Walker River Irrigation District (the "District")
8 it is useful to review the reasons why the Court and the parties should be concerned with the
9 methods the United States and the Tribe have used in identifying the persons to be joined and
10 served as defendants in this action. The reasons were expressed by the Court in the Mineral
11 County subproceeding as follows:

12 This case is essentially an action *in rem* to quiet title to property – that property
13 being the water (or rather, right to take the water) of the Walker River and its
14 tributaries . . . Without all the owners of the property properly joined in the
15 case as defendants, any reallocation of water rights that might result from the
16 case could be subject to future attack. *See March 2, 1999 Order at 4, Subfile C-*
17 *125-C (Doc. No. 257).*

18 In short, any judgment entered in this matter must be binding on all affected water right
19 holders.

20 In an action like this one, a plaintiff may acquire personal jurisdiction over unknown
21 parties by service of a summons by publication. In that situation it must be established that the
22 identity of such persons and their whereabouts could not be discovered after a diligent search.
23 *See April 1, 1997 Minute Order at page 3, Subfile C-125-C (Doc. No. 99),* and cases cited
24 therein. However, as the Supreme Court of the United States stated in *Walker v. Hutchinson*,
25 352 U.S. 112, 115 (1956) "it is common knowledge that mere newspaper publication rarely
26 informs a landowner of proceedings against his property." For that reason a judgment will not
27 bind a person served by publication if that person's identity is a matter of public record and can
28 be ascertained through reasonable diligence. A judgment so obtained is subject to collateral
attack. *See, Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306 (1950); *Mennonite*
Board of Missions v. Adams, 462 U.S. 791 (1983); *Walker v. Hutchinson* 352 U.S. 112 (1956);
Benoit v. Panthaky 780 F.2d 336 (3rd Cir. 1985).

1 Therefore, in assessing the methods used by the Tribe and the United States to identify
 2 the persons and entities described in the Case Management Order, the Court must consider
 3 whether they have failed to use a method of identification through which the identity of such a
 4 person or entity could have been ascertained with reasonable diligence. If they have so failed,
 5 persons or entities not joined will not be bound by any judgment the Court eventually enters.

6 **II. THE FAILURE OF THE UNITED STATES AND THE TRIBE TO CONDUCT**
 7 **ANY RESEARCH WITHIN THE OFFICES OF THE COUNTY RECORDERS**
 8 **WITHIN THE WALKER RIVER BASIN PRESENTS THE VERY REAL**
 9 **POSSIBILITY THAT THEY WILL FAIL TO IDENTIFY A PERSON WHOSE**
 10 **RIGHTS ARE AFFECTED AND WHOSE IDENTITY AND WHEREABOUTS**
 11 **COULD HAVE BEEN DISCOVERED WITH REASONABLE DILIGENCE.**

12 It is apparent that the United States and Tribe have employed methods of identification
 13 directed at obtaining already existing lists or identifications of persons required to be joined.
 14 This has been particularly the case with respect to persons who are successors to parties to the
 15 Walker River Decree. They have studiously avoided bringing the tabulation of water rights and
 16 water rights holders in the Decree current through review of deeds in the offices of County
 17 Recorders. *See e.g., Status Report of United States and Tribe at 26, December 21, 2000;*
 18 *Affidavit of Elizabeth Rimer paras. 8-9, Exh. 2 to Memorandum of United States and Tribe,*
 19 *March 13, 2001.* Except for reviewing deeds obtained from the U.S. Board of Water
 20 Commissioners and the District with respect to the successors-in-interest category, the June 12,
 21 2001 Becker Affidavit makes no reference to having conducted any research within offices of
 22 County Recorders.

23 Paragraph 3 of the Case Management Order requires joinder and service on persons or
 24 entities who hold certain categories of water rights. Under Nevada and California law water
 25 rights in most of those categories will be appurtenant to the land on which they are used.
 26 Therefore, under Nevada and California law, absent something in a deed to the contrary,
 27 ownership of those water rights will pass with ownership of the land on which the water is
 28 used. *See Margrave v. Dermody Properties*, 110 Nev. 824, 828, 878 P.2d 291 (1994); N.R.S.
 § 533.382; *Wetherill v. Brehm*, 240 P. 529, 532 (Cal. App. 1925).

1 Categories which include water rights likely to be appurtenant to real property are
2 categories 3(a) (the successors-in-interest category), category 3(b) (holders of surface water
3 rights under Nevada and California law not included in the Walker River Decree), category
4 3(c) (holders of permits or certificates to pump groundwater issued by the State of Nevada and
5 domestic users of groundwater in certain subbasins in Nevada), category 3(d) (holders of
6 permits or certificates to pump groundwater issued by the State of Nevada within certain
7 subbasins), category 3(e) (users of groundwater for irrigation in California), category 3(f) (all
8 holders of vested rights to the use of groundwater under the laws of the State of Nevada), and
9 category 3(i) (industrial users in Nevada).

10 From the material provided by the United States and the Tribe, it is clear that they have
11 made no attempt to examine information available in Recorder's offices concerning ownership
12 of water rights within the categories listed in the Case Management Order. This failure is
13 mitigated somewhat with respect to category 3(a) by work which the United States Board of
14 Water Commissioners and the District undertake in reviewing deeds provided to those entities
15 by Lyon County. There is, however, no similar direct or indirect link between the information
16 which the United States and Tribe have reviewed concerning other categories in the Case
17 Management Order and County Recorders offices. There is no assurance, for example, that
18 State Engineer well log information on a domestic wells represents the current owner of the
19 land to which that domestic well is appurtenant or that State Engineer assignment information
20 concerning an irrigation or industrial well represents the current owner of the land to which
21 water rights from such wells are appurtenant. That failure is also mitigated somewhat by the
22 fact that many of the persons with water rights in category 3(a) will also be persons with water
23 rights in categories 3(b), 3(c), 3(d), 3(e), and 3(f). However, as the Becker Affidavit reflects,
24 not all of the persons or entities have multiple water rights and claims to rights to water in more
25 than one of the Case Management Order categories. *See June 12, 2001 Becker Affidavit at*
26 *paragraphs 8, 17b, 18c, 20d and 24a.*
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28

1 **III. EFFORTS TO IDENTIFY USERS OF GROUNDWATER FOR IRRIGATION IN**
 2 **CALIFORNIA IN THE WALKER RIVER BASIN ARE INADEQUATE.**

3 As the Becker Affidavit recognizes, the California State Water Resources Control
 4 Board does not maintain information on or regulate the use of groundwater for irrigation. Yet,
 5 the only information which Mr. Becker has examined with respect to this category appears to
 6 be information from the California State Water Resources Control Board. *See, Becker Affidavit*
 7 *at para. 19.* As noted in the Becker Affidavit, that information has not yielded any persons and
 8 entities in this category. Information provided by an entity which maintains no information on
 9 a category is not adequate.

10 **IV. THE UNITED STATES AND THE TRIBE SHOULD NOT RELY ON**
 11 **INFORMATION OR MATERIAL FILED BY MINERAL COUNTY.**

12 In a number of places, the Becker Affidavit references material obtained from Mineral
 13 County in the subfile C-125-C proceeding. In many instances the Becker Affidavit notes
 14 problems with these materials. *See, e.g., Becker Affidavit at paras. 15i, 15j, and 15k.* The
 15 Court is very familiar with Mineral County's approach to service and identification. Moreover,
 16 over six years have elapsed since Mineral County began to identify and serve water right
 17 holders. The United States and Tribe should not rely on work done by Mineral County as a
 18 method for identifying persons to be joined and served here.

19 **V. CONCLUSION.**

20 The efforts made by the United States and the Tribe to identify persons and entities to
 21 be served pursuant to Paragraph 3 of the Case Management Order have been substantial.
 22 However, without some work in the offices of County Recorders, it is possible, if not likely,
 23 that they will fail to join and serve persons whose rights will be affected, whose names are a
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1 matter of public record and who therefore could have been ascertained with reasonable
2 diligence.

3 Dated this 3rd day of August, 2001.

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CERTIFICATE OF MAILING

I certify that I am an employee of Woodburn and Wedge and that on this date, I deposited in the United States Mail, postage prepaid, a true and correct copy of the foregoing ***STATEMENT OF THE WALKER RIVER IRRIGATION DISTRICT REGARDING METHODS USED BY THE UNITED STATES OF AMERICA AND WALKER RIVER PAIUTE TRIBE TO IDENTIFY PERSONS AND ENTITIES TO BE SERVED PURSUANT TO PARAGRAPH 3 OF THE CASE MANAGEMENT ORDER*** in an envelope addressed to and where indicated by an asterisk by Federal Express also:

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